

## What is a woman?

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## Index on censorship piece

Kathleen Stock

This week, Maya Forstater's appeal against a 2019 employment tribunal verdict has come to court. Tax expert Forstater originally brought the US-based Center for Global Development to a tribunal after she had expressed certain beliefs on Twitter and been denied work by the Center on that basis. The Center had found those beliefs "offensive and exclusionary" and failed to renew her visiting fellowship<sup>1</sup>. At the 2019 tribunal, Forstater's lawyers argued that this failure constituted discrimination on the grounds of philosophical belief, a thing prohibited under section 10 of the Equality Act. But Judge James Tayler demurred, ruling that Forstater's beliefs failed to meet necessary tests for a "philosophical belief" technically defined in legal precedent<sup>2</sup>. Namely: they failed to be "worthy of respect in a democratic society" or compatible "with human dignity and fundamental rights of others". The tribunal found that therefore her former employer had done nothing illegal.

The appeal this week, whose verdict will follow in months to come, gave us a chance to revisit the particular beliefs at issue, apparently so shocking to Judge Tayler. Forstater believes that humans constitute a sexually dimorphic species, typically producing two differently sized and shaped beings, whose differently shaped gametes can then combine in the process of sexual reproduction. She believes that biological sex for humans is neither a feeling nor an identity, but rather a lifelong material state that can't be changed through surgery, drugs, nor anything else. She believes that the capacity to refer, in language, to human biology and its various social impacts is especially important for one sex in particular: the female one, given the presence of sexism in society and divergent outcomes for the sexes in areas like medicine, sport, employment, and sexual assault statistics. Because of these beliefs, she also believes that she and others should be able to refer accurately to the sex of trans people in some relevant circumstances, rather than be automatically forced to participate in a fiction according to which trans people have changed their sex to their preferred alternative. She professes herself politely willing to use preferred pronouns corresponding to inner feelings of gender identity, but also wishes to describe trans women as biologically male in general terms - a description she believes is accurate - for the purposes of certain discussions of women's rights in practice. This seems to her reasonable in a context where public policies about public spaces, resources, and sporting activities are increasingly organised around gender identity rather than sex, with arguably serious consequences for women and girls.

I'm an academic philosopher, employed at a British university. I share these beliefs of Forstater's. Indeed, I'm about to publish a book defending them. So when the tribunal judgement came out, it was more than a little worrying – if not also slightly comic - to discover that a judge thinks these beliefs of mine don't count as "philosophical" enough to

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<sup>1</sup> Appellant's skeleton argument, *Forstater v CGD and others*, Employment Appeal Tribunal, April 2021. <https://hiyamaya.files.wordpress.com/2021/04/forstater-eat-claimant-skeleton-argument-plus-low-res-pages-1-50.pdf>

<sup>2</sup> Tayler (2019), *Maya Forstater v CGD Europe and others*: 2200909/2019, [https://assets.publishing.service.gov.uk/media/5e15e7f8e5274a06b555b8b0/Maya\\_Forstater\\_vs\\_CGD\\_Europe\\_Centre\\_for\\_Global\\_Development\\_and\\_Masood\\_Ahmed\\_-\\_Judgment.pdf](https://assets.publishing.service.gov.uk/media/5e15e7f8e5274a06b555b8b0/Maya_Forstater_vs_CGD_Europe_Centre_for_Global_Development_and_Masood_Ahmed_-_Judgment.pdf)

gain basic legal protection. The judge was willing to concede that Forstater's beliefs – and so presumably, mine - attained the required standard of “cogency, seriousness, coherence and importance”, though he also suggested the beliefs were false, including the belief that there are only two sexes and that sex is immutable. This, he suggested, had been proven by modern science to be out-of-date. I think he's wrong about that and I explain why in my book. But either way, his opinion that Forstater is factually wrong is irrelevant as far as the judgement goes. It's not a requirement for protection under law that a belief seem true to a judge, nor even that there should be good evidence for it according to experts. Belief systems positively protected under Section 10 at previous employment tribunals have included Stoicism, Scottish nationalism, spiritualism, and the belief that homosexuality is a sin.

The main basis for the original judgement seems to have been the assumption that stating beliefs about the sex of trans people – even in a generalised, third-personal form – causes them “enormous pain”, possibly even meeting the Equality Act's definition of harassment in some contexts according to the judge. Forstater's appeal lawyers have argued that causing even grave offence doesn't thereby meet the standard of harassment, and that the context of Forstater's statements shows they were not harassing. In their skeleton argument, her team point out that in a pluralist society with many competing perspectives jostling for space, the expression of views which cause offense to others is an inevitability<sup>3</sup>. Hence offense on its own cannot reasonably be the grounds of illegality. They also argue, along lines originally suggested by John Stuart Mill, that “the taking of offence by one side ... may indeed underline” the value of speech by the other side, since, where a challenge to a valued set of beliefs is particularly cogent and rationally compelling, there's a human tendency to compensate by moving towards defensive outrage in response. Citing multiple legal precedents, Forstater's lawyers stress that it's not a court's role to intervene on one side or other of any such contentious argument, except in extreme and exceptional cases where the aim is the grave destruction of the rights of others – something that is not the case for their client.

By now, you might be wondering: how has the expression of relatively mundane beliefs about biological classification - beliefs that even five years ago were uncontroversial and held by nearly everyone, and that still are held by millions of people worldwide – come to count for some, including for the tribunal judge, as approximating harassment? There are two plausible explanation: a narrow and a wider one. The narrow explanation is: highly efficient activist campaigning. Since 2015, the LGBT charity Stonewall has been advising organisations that an inner feeling of gender identity determines how you should be referred to in all contexts, rather than actual facts about your sex, or even about your possession of a Gender Recognition Certificate if you are trans. Organisations pay to join Stonewall's Diversity Champion programme, whereupon they are instructed to replace references to biological or legal sex in policies and resources by inserting reference to gender identity or “self-ID” instead. These instructions have been heeded by many national organisations, despite neither the Gender Recognition Act 2004 nor the Equality Act 2010 concerning themselves with gender identity as a concept. Rather, these laws talk of “gender reassignment”, legally identifying and protecting a process rather than a feeling. Even so,

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<sup>3</sup> Appellant's skeleton argument, Forstater v CGD and others.

“misgendering” – that is, failing to “respect” a person’s inner feelings of gender identity in verbal descriptions of them – has come to be understood by many employers as automatically bullying and transphobic if done deliberately, and embarrassing and hurtful even if done inadvertently; something for which you should immediately apologise if you do it<sup>4</sup>.

The influence of Stonewall in this respect extends to the justice system. Their Diversity Champion programme currently includes the Crown Prosecution Service, the Ministry of Justice, the Scottish Courts and Tribunals Service, and several police forces as members<sup>5</sup>. The Equal Treatment Bench Book, produced by the Judicial College in order to guide judges in decision-making, also explicitly contains Stonewall recommendations scattered throughout. For instance, it advises: “Everyone is entitled to respect for their gender identity regardless of their legal gender status. It is important to respect a person’s gender identity by using appropriate terms of address, names and pronouns”. It goes on: “It should be possible to recognise a person’s gender identity and their present name for nearly all court and tribunal purposes, regardless of whether they have obtained legal recognition of their gender by way of a Gender Recognition Certificate”<sup>6</sup>. This week, Forstater’s appeal team argued that the tribunal appears to have improperly relied on the Bench Book “to inform its assessment of the substantive issues”<sup>7</sup>. (This reliance was underlined by the respondent’s legal team in oral argument: at one point their QC relied upon an example of misgendering in the book, alleged to constitute trans harassment, asking “How can the Equal Treatment Bench Book be wrong?”<sup>8</sup>).

Leaving aside Stonewall’s influence, a wider explanation of which the tribunal verdict is a prime example is an increasing tendency within society to elide the distinction between fact and value. As Forstater’s appeal team pointed out, “statements such as ‘woman means adult human female’ or ‘transwomen are male’ are (for her) statements of neutral fact not expressions of value judgment, still less of bigotry, transphobia or antipathy towards trans people.” This interpretation is reasonable against a particular philosophical position on language generally, which says that in principle, some sentences can be free of implied evaluations. They simply aiming to represent and categorise what’s already there in the world without assessing it positively or negatively. That is: there’s a coherent distinction between description and evaluation. To say that transwomen are male need not be a slur nor an insult nor a negative evaluation at all, but rather could, in context, be a dispassionate description of a perceived fact about biological category membership.

These days, however, a rival theory of language is in the cultural ascendant. This says that any categorisation of humans automatically implies evaluation, no matter how putatively neutral its surface form. Statements of fact are always implicitly statements of value. On this

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<sup>4</sup> ‘Happy International Pronouns Day!’ Stonewall website, 21<sup>st</sup> October 2020, <https://www.stonewall.org.uk/about-us/news/international-pronouns-day>

<sup>5</sup> List of Diversity Champion Scheme members, Stonewall website, <https://www.stonewall.org.uk/diversity-champions-members>

<sup>6</sup> *Equal Treatment Bench Book*, Judicial College, February 2021. <https://www.judiciary.uk/wp-content/uploads/2021/02/Equal-Treatment-Bench-Book-February-2021-1.pdf>

<sup>7</sup> Appellant’s skeleton argument, *Forstater v CGD and others*, paragraph 55.

<sup>8</sup> <https://twitter.com/SexMattersOrg/status/1387348321627525121>

view, to categorise someone as male or female is to implicitly set a normative standard which perniciously “excludes” and devalues those who don’t meet the standard. As the respondent’s team described Forstater in court: “She is creating ... a sort of sex superiority, which creates two classes of women: real and fake women. That is beyond the pale.”<sup>9</sup> On this view, then, concepts and categories like *man* and *woman* should be made more “inclusive” on the grounds of social justice – just as if they were institutions or organisations seeking additional diversity in membership, rather than shared cognitive tools whose whole point, arguably, is to exclusively identify certain kinds of people and not others, the better to refer to those kinds of people particularly in usefully fine-grained ways. In case it’s not obvious, I think this second view of language is hopeless. But for as long as some bastardized version of it is floating about in the popular ether, then we’re likely to continue to see attempts by employers – and even perhaps by judges - to shut down discussion of perceived facts, on the grounds that they are supposedly automatically laden with negative consequences.

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<sup>9</sup> <https://twitter.com/SexMattersOrg/status/1387339541871316994>